



# ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704  
HELENA, MONTANA 59620-1704  
(406) 444-3742

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## MEMORANDUM

December 4, 2001

TO: Representative Harris

FR: Todd Everts, EQC Legal Counsel

RE: A Legal Opinion on the Authority of the Environmental Quality Council (EQC) to Review Administrative Rules Adopted by Boards or Commissions Administratively Attached to the Departments of Environmental Quality, Natural Resources and Conservation, and Fish, Wildlife, and Parks.

CC: Rep. Barrett LEPO Staff  
Mr. Strause  
Mr. Petesch

This memorandum is in response to your request for a legal opinion from me as the EQC's legal counsel on the following issue:

***Does the EQC have the statutory authority under sections 2-4-402 through 2-4-412, MCA, to review administrative rules adopted by a board, commission, or other entity administratively attached to the Departments of Environmental Quality, Natural Resources and Conservation, and Fish, Wildlife, and Parks?***

**Short Answer:** Yes.

### **Legal Analysis:**

The EQC is a statutory standing interim council of the Montana Legislature pursuant to Title 5, chapter 16, MCA. Among its very broad and encompassing statutory duties and oversight responsibilities, the EQC is specifically charged to *perform the administrative rule review, draft legislation review, program evaluation, and monitoring functions of an interim committee for the:*

- (a) *department of environmental quality;*
- (b) *department of fish, wildlife, and parks; and*

(c) *department of natural resources and conservation* (section 75-1-324(10), MCA (emphasis added)).

Add together the italicized verbiage above and the EQC is required to *perform the administrative rule review functions of an interim committee for the department of environmental quality, the department of fish, wildlife, and parks, and the department of natural resources and conservation*. In order to determine whether the EQC has the authority to review administrative rules under the Montana Administrative Procedure Act (MAPA) of administratively attached entities to departments, the following questions must be analyzed and answered:

1. What constitutes the administrative rule review under MAPA?
2. Is the EQC considered an administrative rules committee under MAPA?
3. If the EQC is considered an administrative rules committee under MAPA, what is the scope of the EQC's review?

I will analyze each of these questions below.

**1. What constitutes the administrative rule review under MAPA?**

MAPA provides for the legislative review of rules pursuant to sections 2-4-402 through 2-4-412, MCA. MAPA requires that the administrative rules committees review "all proposed rules filed with the secretary of state" (section 2-4-402(1), MCA). Administrative rule review means that the appropriate administrative rule review committee may:

- ◆ request and obtain an agency's rulemaking records for the purpose of reviewing compliance with section 2-4-305, MCA (section 2-4-402(2)(a), MCA)
- ◆ prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing (section 2-4-402(2)(b), MCA)
- ◆ require that a rulemaking hearing be held in accordance with the provisions of sections 2-4-302 through 2-4-305, MCA (section 2-4-402(2)(c), MCA)
- ◆ institute, intervene in, or otherwise participate in proceedings involving Title 2, chapter 4, MCA, in the state and federal courts and administrative agencies (section 2-4-402(2)(d), MCA)
- ◆ review the incidence and conduct of administrative proceedings under Title 2, chapter 4, MCA (section 2-4-402(2)(e), MCA)
- ◆ initiate a poll of the legislature by mail to determine whether a proposed rule is consistent with the intent of the legislature (section 2-4-403, MCA)

- ◆ request a statement of economic impact of the adoption, amendment, or repeal of a rule (section 2-4-405, MCA)
- ◆ object to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with sections 2-4-302, 2-4-303, and 2-4-305, MCA (section 2-4-406, MCA)

**2. Is the EQC considered an administrative rules committee under MAPA?**

Although it is a circuitous and winding path, the answer to this question is "yes". An administrative rules committee under MAPA is defined as the appropriate committee assigned subject matter jurisdiction in Title 5, chapter 5, part 2 (section 2-4-102(1), MCA). The "appropriate" committees assigned subject matter jurisdiction in Title 5, chapter 5, part 2, are interim committees. Interim committees are specifically defined in section 5-5-202, MCA, as follows:

**5-5-202. Interim committees.** (1) During an interim when the legislature is not in session, the committees listed in subsection (2) are the interim committees of the legislature. They are empowered to sit as committees and may act in their respective areas of responsibility. *The functions of the legislative council, legislative audit committee, legislative finance committee, environmental quality council, and state-tribal relations committee are provided for in the statutes governing those committees.*

(2) The following are the interim committees of the legislature:

- (a) economic affairs committee;
- (b) education and local government committee;
- (c) children, families, health, and human services committee;
- (d) law and justice committee;
- (e) revenue and transportation committee; and
- (f) state administration and veterans' affairs committee.

(3) *An interim committee or the environmental quality council may refer an issue to another committee that the referring committee determines to be more appropriate for the consideration of the issue.* Upon the acceptance of the referred issue, the accepting committee shall consider the issue as if the issue were originally within its jurisdiction. If the committee that is referred an issue declines to accept the issue, the original committee retains jurisdiction.

(4) If there is a dispute between committees as to which committee has proper jurisdiction over a subject, the legislative council shall determine the most appropriate committee and assign the subject to that committee (emphasis added).

Although there are two references to the EQC in section 5-5-202, MCA, the EQC is not defined as an interim committee. Further, the EQC is not specifically assigned subject matter jurisdiction

in Title 5, chapter 5, part 2, which is a prerequisite for being defined as an administrative rules committee pursuant to MAPA (section 2-4-102(1), MCA). As I have noted previously, the EQC is a statutory interim council of the Legislature, not an interim committee.

However, section 5-5-202(1), MCA, specifically cross-references the EQC's statutory functions. Those statutory functions pursuant to section 75-1-324, MCA, include the performance of the administrative rule review functions of an interim committee in the EQC's departmental subject matter jurisdiction. The EQC is statutorily required to conduct administrative rule review pursuant to MAPA as if the EQC was an "interim committee" (section 75-1-324(10), MCA). When several statutes apply to a situation, the statutes should be construed, if possible, in a manner that will give effect to each of them. See *Schuman v. Bestrom*, 214 M 410, 693 P2d 536, 42 St. Rep. 54 (1985). In addition, the Montana Supreme Court has repeatedly held that it is a well-settled principle of statutory construction that the specific statute, such as the EQC's detailed authority under section 75-1-324(10), will control the general statute. See *State ex rel. Marlenee v. District Court*, 181 M 59, 592 P2d 153 (1979), and *Kadillak v. The Anaconda Co.*, 184 M 127, 602 P2d 147 (1979).

If it smells like a fish, feels like a fish, looks like a fish, and tastes like a fish . . . it's a fish! The EQC is, by specific statutory reference, to function as an interim committee for administrative rule review purposes. By definition, if the EQC is required to act as an interim committee it is considered to be an administrative rules committee pursuant to MAPA.

**3. If the EQC is considered an administrative rules committee under MAPA, what is the scope of the EQC's review?**

This question gets at the crux of the issue--does the EQC's administrative rule review function extend beyond just departments to administratively attached entities? The EQC is required under section 75-1-324(10) to *perform the administrative rule review*, draft legislation review, program evaluation, and monitoring *functions of an interim committee* for the:

- (a) *department of environmental quality;*
- (b) *department of fish, wildlife, and parks; and*
- (c) *department of natural resources and conservation* (emphasis added).

Section 75-1-324(10), MCA, only refers to "department". Unlike the six interim committees, there is no statutory reference in section 75-1-324(10), MCA, attached to the terms department or agency that says "and the entities attached to agencies for administrative purposes." See sections 5-5-223, 5-5-224, 5-5-225, 5-5-226, 5-5-227, and 5-5-528, MCA. The Montana Supreme Court, at least initially in its analysis, presumes that the Legislature knew what it was doing when it wrote the law. See *State ex rel. Palmer v. Hart*, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982). Although inconsistent in its application, the Montana Supreme Court has also held that in construing a statute, courts cannot insert what has been omitted. See *State ex rel. Palmer v. Hart*,

201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982), and *Skrukrud v. Gallatin Laundry Co., Inc.*, 171 M 217, 557 P2d 278 (1976).

So is the omission of "other entities attached . . ." in the EQC's statutory duties provisions a fatal flaw? In my opinion, no. As I have previously noted, the Montana Supreme Court has held that when several statutes apply to a situation, the statutes should be construed, if possible, in a manner that will give effect to each of them. See *Schuman*, supra. The EQC has been established as an administrative rules committee under MAPA. An administrative rules committee is required to review "all proposed rules filed with the secretary of state" (section 2-4-402(1), MCA) (emphasis added). Under MAPA, an agency submits a proposed rule to the secretary of state. An "agency" under MAPA means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts (sections 2-4-102(2) and 2-3-102(1), MCA). Put it all together, and the EQC has the statutory authority under sections 2-4-402 through 2-4-412, MCA, to review administrative rules adopted by a board, commission, or other entity administratively attached to the Departments of Environmental Quality, Natural Resources and Conservation, and Fish, Wildlife, and Parks.

**Recommendation:**

Although I have concluded that the EQC has the administrative rule review authority for attached entities, I would recommend that the EQC introduce legislation for the 2003 Legislature that clarifies this issue.

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TESTIMONY for LC 0511 -  
EQC OVERSIGHT AUTHORITY FOR ENTITIES ATTACHED TO AGENCIES

The Environmental Quality Council is a statutory committee established by law..[MEPA Part 3].

The duties and responsibilities of the EQC are set forth in 75-1-324. [in the bill]

The EQC is charged with the oversight responsibilities of an interim committee for the  
Dept. of Environmental Quality;  
Dept. of Fish, Wildlife, and Parks; and  
Dept. of Natural Resources and Conservation.

The legislature reorganized the legislative branch in 1999 by enacting SB 11 which, among other things, established 6 interim committees. The bill assigned agency oversight responsibilities to each committee and to the EQC.

[SIDE NOTE --- the 6 interim committees are (as renamed in 2001 via SB 10)

(1) economic affairs; (2) education and local government; (3) children, families, health, and human services; (4) law and justice; (5) revenue and transportation; and (6) state administration and veterans' affairs.

Statutory committees include- the legislative council, the legislative audit committee, the legislative finance committee, and the EQC.]

SB 11 provided each of the 6 interim committees oversight authority (administrative rule review, program evaluation, and monitoring functions) for specific state agencies **AND**

**THE ENTITIES ATTACHED TO (the) AGENCIES FOR ADMINISTRATIVE**

**PURPOSES.** ( See 5-5-223,5-5-224, 5-5-225, 5-5-226, 5-5-227, and 5-5-228, MCA)

example:       **5-5-227. Revenue and transportation interim committee.** The revenue and transportation interim committee has administrative rule review, draft legislation review, program evaluation, and monitoring functions for the department of revenue and the department of transportation **and the entities attached to the departments for administrative purposes.**

However, no similar language exists for EQC oversight responsibilities.

Although the EQC received a legal opinion that the Council's oversight authority arguably extended to attached entities, the opinion also suggests clarifying the issue with legislation....therefore LC 511. (see Todds' letter to EQC)

#### **FURTHER DETAILS IF NEEDED**

What does this mean? There are several entities that are attached to the agencies for which the EQC has oversight authority. Several have rule making and program implementation authority and are not simply policy advisors for the agencies.

Examples include:

- (1) Petroleum Tank Release Compensation Board and the (2) Board of Environmental Review attached to the DEQ.
- (3) Board of Oil and Gas attached to the DNRC
- (4) Fish, Wildlife, and Parks Commission for the FWP department.

The EQC became aware of the need for this legislation last interim in its oversight of the issues surrounding the Big Hole-Beaverhead river Recreation Rule adopted by the FWP Commission. While the EQC received full cooperation from the Department and the Commission on this issue, our legal staff suggests that the EQC may wish to amend the law to include specific oversight authority for boards, commissions, and other entities that are or may be attached to the departments for administrative purposes.

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#### **ALTERNATIVE SHORT VERSION TESTIMONY**

This bill proposes to correct an apparent oversight created in 1999 by SB 11. That bill reorganized the legislative branch and established 6 legislative interim committees, providing them with program oversight for specific state agencies and the entities administratively attached to them.

The EQC is a statutory committee. Its duties and responsibilities are listed in the bill before you. Subsection (10) lists the agencies for which the EQC has oversight

responsibility. SB 11 from 1999 failed to amend this section of law to provide the EQC with program review authority for boards, commissions, and other entities attached to the departments. Although we have a staff legal opinion that states that the EQC has implied oversight authority for attached entities, it also suggests that we should clarify this in statute. This bill would do that as you can see from the inserted language in subsection (10). It is the identical language that appears in the authorizing statutes found in Title 5 for the other 6 interim committees.